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Supreme Court of the United States

October Term, 1975

No. 75-[illegible]

[illegible] INSURANCE COMPANY,
[illegible],
Petitioner,

[illegible] and MARY BOSS, on Behalf of
Themselves and All Others Similarly Situated,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS

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[illegible], 1975

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation,
Petitioner,

v.

SANDRA WETZEL and MARI ROSS, on Behalf of Themselves and All Others Similarly Situated,
Respondents

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Did Respondents establish a *prima facie* violation of Title VII with respect to terms, conditions and privileges of employment by demonstrating that their employer imposes a contributory disability insurance program to which its employees must subscribe as a condition of employment and which, with the exception of intentionally self-inflicted and war time disabilities, provides benefits for all disabilities to which male employees may be subjected without providing benefits for all disabilities to which female employees may be subjected?

COUNTERSTATEMENT OF THE CASE

Petitioner Liberty Mutual Insurance Company is a national insurance underwriting company with offices throughout the United States (A. 16-17, 20).[1] Respondents Sandra Wetzel and Mari Ross, two of Petitioner's female employees, commenced this Title VII class action in February, 1972, at a time when Mari Ross was on a maternity leave of absence. Respondents challenged their employer's hiring and promotion practices, its pregnancy-related employment practices and its practice of providing disparate compensation for certain "male" and "female" jobs.

Petitioner provides a contributory disability insurance program (Income Protection Plan) to which its employees must subscribe as a condition of employment (A. 91, 93, 95, 98, 100).[2] Of all medically verifiable disabilities, other than those resulting from acts of war or intentionally self-inflicted injuries, only "disability due to pregnancy or any cause related to pregnancy" is excluded from coverage (A. 42-43, 90, 92, 94-95, 96-97, 98-99). The plan has always been contributory, and the employee's mandatory contribution has ranged from approximately ⅓ to fully ½ of the cost of coverage (A. 91, 93, 95, 97, 99). In addition to the income protection provided by the insurance plan, supplementary salary benefits, which partially fill the gap between insurance benefits and a disabled employee's usual earnings,

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1. "A. —" references are to page numbers of the Appendix.

2. The "current" plan which comprises "Appendix A" to the Brief for Petitioner was never part of the record in this case, differs from the one before this Court and had never been seen by Respondents before receipt of the Brief.

are paid by the Petitioner. In cases covered by insurance under the Income Protection Plan, Petitioner pays the employee's full salary for the first week of disability. Thereafter, it pays ½ the difference between full salary and the insurance benefits for as many weeks as the employee has completed years of service (A. 90, 93, 95, 97, 99). Because pregnancy-related disabilities are not covered by insurance under the Income Protection Plan, no supplementary salary benefits are paid for such disabilities. In cases of long-term illnesses due to pregnancy where a physician is seen, an employee's supervisor has discretion to consider the first five days of such absences as payable under the Company's short-term absence policy. A different, more liberal, short-term absence policy applies to all other disabilities (A. 88-89).

Until March, 1967, pregnant employees were discharged after the sixth month of pregnancy. In March, 1967, Petitioner modified its policy slightly so that pregnant employees were not fired until after the eighth month of pregnancy. These automatic terminations continued until September, 1970, when Petitioner began to impose unpaid leaves of absence as an alternative to mandatory discharge. Employees were placed on forced leaves of absence after the eighth month of pregnancy and were required to return to work no later than six (6) months from commencement of the leave or three (3) months from the date of delivery, whichever came first. The policy was modified in November, 1971, to enable an employee to work for as long as her physician verified her ability to continue prior to delivery. The mandatory return dates, which were applied without regard to disabling complications, remained in force. These discharge, leave and return date practices applied to no other disabilities (A. 153, 157).

Comprehensive discovery concerning hiring and promotion revealed, *inter alia,* that of the 3,129 persons hired for the job of Claims Adjuster during nearly seven (7) years following the effective date of Title VII, 3,127, or 99.99%, were men, and that of the 2,329 persons hired for the lower paid position of Claims Representative during the same period, 2,302, or 98.84%, were women (A. 136). Discovery also disclosed that no employee could aspire to any position in the Claims Department above that of Claims Adjuster without first becoming a Claims Adjuster, a position limited to men (A. 135-37).

Wetzel and Ross moved for summary judgment on the issues of liability for the hiring and promotion and pregnancy-related practices. The only explanation which Petitioner ever gave for its pregnancy-related employment practices consisted of the deposition testimony of Kenneth D. Spaulding, its Manager of Personnel Services, who testified that the policies were adopted "on advice of counsel" (A. 36, 38, 43). Petitioner consistently maintained that there was "no reliable basis to estimate the *cost* of providing pregnancy-related disability benefits" (A. 194), and offered no evidence of its own subjective basis for the pregnancy-related practices or of any financial or business consequences which might result from abandoning those practices. The trial court declared each of the pregnancy-related policies violative of Title VII (A. 157-59).[3]

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3. Petitioner was equally silent concerning the reasons for its hiring and promotion practices. Those practices, too, were declared unlawful (A. 162-63).

The Respondents' third claim, that of discriminatory compensation, was tried to the district court sitting without a jury and is *sub judice.*

The trial court directed the entries of final judgments pursuant to F.R.Civ.P. 54(b). Petitioner filed two appeals, one with respect to its hiring and promotion practices and the class action aspects of this litigation, and the other with respect to those aspects of the pregnancy-related issues dealing with its income protection program and its policy of discharging disabled female employees who do not return to work from maternity leaves of absence by a date certain. The trial court's findings of liability were affirmed by the United States Court of Appeals for the Third Circuit in two separate opinions. *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239 (3rd Cir. 1975), *cert. denied,* 43 U.S.L.W. 3643 (U.S. June 9, 1975); *Wetzel v. Liberty Mutual Insurance Co.,* 511 F.2d 199 (3rd Cir. 1975), *cert. granted,* 95 S.Ct. 1989 (1975).

The Petitioner seeks review only of those aspects of the court of appeals' decision dealing with the exclusion of benefits for pregnancy-related disabilities from its otherwise all-inclusive Income Protection Plan. Although only one practice has been offered for review, Respondents have summarized Petitioner's other employment practices and the rulings of the trial and appellate courts with respect to those practices because the practices are inter-related and because acceptance of Petitioner's argument may automatically revalidate its other pregnancy-related practices. In fact, Petitioner is urging the trial court to defer the issuance of an injunction against continuation of its other pregnancy-related practices pending this Court's decision.[4] If this

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4. Letter of August 21, 1975, from Kalvin M. Grove, counsel for Petitioner, to Judge Gerald Weber of the United States District Court for the Western District of Pennsylvania.

Court accepts the argument that disparate treatment of pregnant employees is beyond the proscription of Title VII, employers will be free not only to deny benefits for pregnancy-related disabilities but also to fire pregnant employees without regard to their ability to work or to their records as experienced, loyal employees. Respondents have also summarized the history of other aspects of this litigation because they believe that their employer's new found reliance upon the so-called "cost defense" which it previously claimed it was unable to support should be reviewed against its consistent practice of asserting for appellate review facts or defenses upon which it never relied below.[5]

Because of the arguments made by Petitioner and its supporting *amici,* it is important to define precisely what Respondents do and do not claim. Contrary to the suggestion contained in the broad statement of the Question Presented in Petitioner's Brief, Respondents do not contend that Title VII requires all employers to provide

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5. Illustrative of Petitioner's constantly shifting positions was its admission below that coverage for all complications arising from pregnancy is excluded from its income protection program. It now contends, with no support in the record, that complications are covered and that only "normal pregnancy" is excluded. This argument is dealt with *infra* at 28-29.

Similarly, Petitioner asserted at the oral argument on Respondents' motion for summary judgment that the Respondents' request for notice to class members was "purely to build up the amount of damages" and that there was "no reason whatsover for any notice to issue in this case." Transcript of Proceedings of October 31, 1973, p. 71. Thereafter, Petitioner unsuccessfully urged the court of appeals and this Court to reverse the class action judgment based upon the failure to provide class members with notice of the pendency of the action.

income protection plans or disability benefits for pregnancy or for all pregnancy-related disabilities. They do contend that absent a showing of a legally valid justification for exclusion, an employer who has a disability program which provides coverage and supplementary salary benefits for every disability with which a male may be afflicted is precluded by Title VII from excluding only pregnancy-related disabilities from that program. Although the fact may be obscured by the wide-ranging arguments of the Petitioner and its *amici,* many of whom are defendants in similar litigation, this case is limited to a context in which the Petitioner agreed that the case was ripe for summary judgment (A. 108)[6] and rejected the opportunity to justify any of the practices which were condemned by the trial and appellate courts. Although it may be tempting to view this case as one which must resolve all pregnancy-related Title VII issues for all employers and all employees for all time, it must be remembered that the case was decided in a narrow factual, legal and procedural context. The belated and unrelated factual arguments now raised by Petitioner and its *amici* have nothing to do with this case.

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6. *See* also, Transcript of Proceedings of October 31, 1973, p. 75.

SUMMARY OF ARGUMENT

This case involves a question of statutory construction regarding the legality under Title VII of the Civil Rights Act of 1964 of the Petitioner's Income Protection Plan. Petitioner's plan affords benefits for all temporary disabilities except those related to pregnancy and childbirth, the disparate consequence of which adversely affects female workers in their employment opportunities. Petitioner concedes that Congress has power to regulate such benefit programs and that its Income Protection Plan is subject to the reach of Title VII.

Because this case was decided on a motion for summary judgment based upon undisputed facts and in the absence of defenses asserted by Petitioner, the only issue before this Court is whether Respondents demonstrated the existence of a *prima facie* case of sex discrimination under Title VII. During the ten year lifetime of Title VII, a single standard has evolved for establishing *prima facie* violations of the Act and demarcating the burden of proof between employers and employees. That standard requires the employee to demonstrate membership in a protected class and an adverse impact of a challenged employment practice upon that class. Here, the Respondents demonstrated that female employees are adversely affected by Petitioner's Income Protection Plan. Petitioner, however, when confronted with that showing, elected not to explain or justify the reasons for its practices.

The Equal Employment Opportunity Commission's Guidelines dealing with pregnancy-related employment practices also provide that the practice challenged herein is *prima facie* violative of Title VII. Although the Guidelines were not enacted until 1972, the Commission

had expressed the views contained therein as early as 1969, and those views were known to Congress when it amended Title VII in 1972. The Guidelines have been afforded deference by virtually every district court and court of appeals which has considered them. Their relevant provisions are substantively identical to HEW regulations which were submitted to and approved by Congress and also to other proposed agency regulations and guidelines.

Whether pregnancy-related employment practices, such as mandatory terminations of pregnant employees, mandatory maternity leaves which do not take into account an employee's ability to work and disparate treatment of pregnancy-related disabilities under temporary disability programs, can violate Title VII is not a new question to the courts. Numerous district courts and courts of appeals have considered the issue and reached results which are consistent with the instant decision. No court has concluded, in either a Title VII or a Fourteenth Amendment employment discrimination case, that such practices cannot constitute proscribed sex discrimination. *Geduldig v. Aiello,* 417 U.S. 484 (1974), the principal case relied upon by Petitioner, is factually, procedurally and legally inapposite.

ARGUMENT

I. Respondents Established A Prima Facie Violation Of Title VII With Respect To Terms, Conditions And Privileges Of Employment By Demonstrating Their Employer's Imposition Of A Contributory Disability Insurance Program To Which Employees Must Subscribe As A Condition Of Employment And Which, With The Exception Of Intentionally Self-Inflicted And War Time Disabilities, Provides Benefits For All Disabilities To Which Male Employees May Be Subject Without Providing Benefits For All Disabilities To Which Female Employees May Be Subjected.

At the core of this case are the interpretation of Title VII's proscription against sex discrimination and the question of whether pregnancy-related employment practices ever can fall within that proscription. Neither Petitioner nor any of its supporting *amici* contends that Congress is not free to regulate the conduct complained of or that this case involves anything other than a question of statutory construction. If Title VII cannot apply to pregnancy-related employment practices as a matter of law, the decision of the court of appeals must be reversed. If, however, there are any circumstances under which the reach of Title VII can extend to such practices, the record in this case mandates affirmance.

A. Respondents Carried Their Title VII Burden of Showing Membership in a Protected Class and the Adverse Effect of the Challenged Employment Practice on That Class, and Thereby Shifted to Their Employer the Burden of Proving Justification.

Congress enacted Title VII to assure equality of employment opportunities, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. *Albemarle Paper Co. v. Moody*, 43 U.S.L.W. 4880 (U.S. June 25, 1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Act prohibits employment practices which have either the purpose or effect of discriminating on the basis of a protected status without regard to motive or intent. *Moody, supra; Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973); *Griggs, supra*. A Title VII plaintiff need show only membership in a protected class and the adverse effect of an employment practice on that class in order to shift to the employer the burden of showing a legitimate, non-discriminatory reason for the practice and a manifest relationship between the practice and the employment in question. *Moody, supra; Green, supra; Griggs, supra*. Only if the employer meets that burden must the Title VII plaintiff come forward to show that the stated justification is actually a pretext for prohibited discrimination. *Moody, supra; Green, supra*. This standard, which recognizes the inherent difficulty in demonstrating discrimination which is often subtle, covert and facially neutral, applies to Title VII sex discrimination cases. *Edwin L. Wiegand Co. v. Jurinko*, 414 U.S. 970 (1973) *(per curiam)*. Respondents carried

their initial burden. Their employer, when confronted with the burden of justifying its practice, did nothing.

Petitioner's Income Protection Plan deprives women of employment opportunities. Only women suffer the deprivation of income during the first seven (7) days of a long-term illness which requires the care and treatment of a doctor (A. 88-89), and only a woman must depend upon her supervisor's discretion to consider the first five (5) days of an absence from work as compensable under Petitioner's "short-term" absence policy. *Id.* Even then, that discretion may not be exercised unless the woman has seen a doctor, a condition which is never imposed upon male employees. *Id.* Only women are denied supplementary salary benefits. Only women are deprived of the opportunity to resume full-time employment with no loss of status following a long-term disability without regard to the cause of the disability. By providing income protection benefits to disabled employees until age 65, Petitioner provides the opportunity to be free from the inability to resume or find new employment and from the financial ruin which often accompanies long-term disability. Only the female disabled by pregnancy or childbirth or complications resulting therefrom is deprived of those opportunities. The effect of the deprivation of benefits under Petitioner's Income Protection Plan is aggravated by the mandatory return to work date which applies only to pregnancy-related disabilities and which is inextricably linked to the Income Protection Plan. Not only is the disabled female employee afforded no income protection to tide her over a temporary disability, but she is also fired if that disability does not terminate soon enough to enable her to return to work within an arbitrary period of time which is applied to no other disability. The impact is aggravated even further by the fact that Petitioner's health insurance plan provides coverage for children of employees working for the Company at the time of the birth of a child, but excludes from coverage the children of women on maternity leaves at the time of the child's birth, a practice which applies to and adversely affects only female employees (A. 145).

Seizing upon footnote 20 in *Geduldig v. Aiello,* 417 U.S. 484 (1974), discussed *infra* at Part IC, Petitioner argues in effect that its plan distinguishes not between men and women but between "pregnant females and non-pregnant persons." It is obvious, however, that each non-pregnant female person is potentially a pregnant female although, of course, no non-pregnant male person is. Approximately 84% of the married women in the United States experience pregnancy and its accompanying disability at least once, and a married woman in the United States is pregnant an average of 2½ times in her life.[7] Consequently, each of the Petitioner's female employees, whether she ever becomes pregnant or not, is potentially subject to the adverse effects of the Income Protection Plan and Petitioner's other pregnancy-related practices.

Working women, like men, become disabled for various reasons. All of the Petitioner's disability benefits, with their concommitant opportunities for continuing employment and avoiding financial ruin, are available

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7. U. S. Department of Commerce, Bureau of Census, *1970 Census of Population*: detailed characteristics P.C. (1)—D. 1, United States, Summary Table 111. 1-671 (1973). These statistics are derived from 1970 Bureau of the Census data on the number of children born and do not take into account pregnancies which did not result in the birth of a child, those resulting in multiple births, or those of women who have never been married.

to all male employees but not to all female employees. Unless the Petitioner is permitted to classify certain positions as "male" and "female" as the trial and appellate courts found that it did, it must be presumed that men and women will compete with one another for positions and opportunities within the Company. It is precisely that kind of competition which *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) *(per curiam)*, protects. In asserting that their practices do not discriminate against similarly situated members of the opposite sex, Petitioner and its *amici* take far too narrow a view. First, male and female employees of like qualifications are indeed "similarly situated" in the employment relationship—at least until the female becomes pregnant. Then, the policies which Petitioner concedes are based upon a sexual characteristic work their disparate consequences. As the court pointed out in *Gilbert v. General Electric Co.*, 375 F.Supp. 367 (E.D. Va. 1974), *aff'd*, —— F.2d ——, 10 FEP Cases 1201 (4th Cir. 1975):

> . . . it is a claim of disparate treatment of persons, otherwise similarly situated, on the basis of a particular condition, the peculiarity of which is both irrelevant to the purpose of the company program and ineluctably sex linked. 375 F.Supp. 367, 385.

The suggestion that the practice should be saved because it adversely affects only a subgroup of women directly contravenes the policy established in *Phillips*. Acceptance of that suggestion can operate to revitalize all of the mandatory maternity leave and termination policies which likewise affect only women and which have been condemned consistently under Title VII. *See, e.g., Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975); *Singer v. Mahoning County Board of Mental Retardation*, 379 F.Supp. 986 (N.D.Ohio 1974), *aff'd on other grounds*, —— F.2d ——, 10 EPD ¶10,287 (6th Cir. 1975) *(per curiam); Vineyard v. Hollister Elementary School District*, 64 F.R.D. 580 (N.D.Cal. 1974).

B. Although Approval of the Equal Employment Opportunity Commission's Guidelines Is Not Crucial to the Demonstration of a *Prima Facie* Case, the Guidelines Are Nevertheless Entitled to Judicial Deference.

Although reliance upon and deference to the Equal Employment Opportunity Commission's Guidelines which deal with pregnancy-related employment practices are unnecessary to sustain the decision of the court of appeals, *Gilbert v. General Electric Co.*, ——F. 2d——, 10 FEP Cases 1201 (4th Cir. 1975), the Guidelines are entitled to judicial deference and demonstrate a *prima facie* violation of Title VII.[8]

In adopting a shotgun approach intended to undermine the Guidelines with which Petitioner's practices directly conflict, Petitioner and its supporting *amici* overlook or misconstrue those decisions of this Court which deal with the Guidelines and, consequently, fail to recognize the very narrow range within which such interpretations will not be afforded deference. This Court first put its imprimatur of "great deference" upon the Commission's interpretive Guidelines in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and thereafter in *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86

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8. The applicable Guidelines are reproduced in the Appendix at 201-03.

(1973), and *Albemarle Paper Co. v. Moody,* 43 U.S.L.W. 4880 (U.S. June 25, 1975). In *Moody,* the Court recognized that the Guidelines "are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress," 43 U.S.L.W. 4880, 4888, but nevertheless afforded them great deference as the "administrative interpretation of the Act by the enforcing agency." *Id.*[9]

Espinoza, which is instructive in several respects, supports Wetzel and Ross' position and deference to the Guidelines. In *Espinoza,* too, the Commission, through its General Counsel, earlier announced an interpretation inconsistent with its later Guideline. This Court never-

9. This recognition in *Moody* impliedly rejects the Petitioner's contention that the Commission's failure to comply with the formal procedures of the Administrative Procedure Act mandates rejection of the Guidelines. In *Espinoza, supra,* this Court reaffirmed the principle that the Guidelines are entitled to great deference except for those unusual circumstances where "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question" or "where there are 'compelling indications that it is wrong.' " 414 U.S. 86, 94-95.

Even after this Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974), discussed *infra* at Part IC, every United States Court of Appeals which considered the Commission's Guidelines dealing with pregnancy-related employment practices in a Title VII case afforded them great deference. *Satty v. Nashville Gas Co.,* —— F.2d ——, 11 FEP Cases 1 (6th Cir. 1975); *Hutchison v. Lake Oswego School District,* —— F.2d ——, 11 FEP Cases 161 (9th Cir. 1975); *Gilbert v. General Electric Co.,* —— F.2d ——, 10 FEP Cases 1201 (4th Cir. 1975); *Communications Workers v. American Telephone & Telegraph Co.,* 513 F.2d 1024 (2d Cir. 1975), *petition for cert. docketed at* No. 74-1601 (June 19, 1975); *Holthaus v. Compton & Sons, Inc.,* 514 F.2d 651 (8th Cir. 1975).

theless concluded that the "more recent interpretation of the statute in the guideline relied on . . . is no doubt entitled to great deference." 414 U.S. 86, 94. The Guideline was not applied in that case, however, because there was no indication in the record that the defendant's challenged policy had the purpose or effect of discriminating against persons of Mexican national origin as alleged, and because the plain language of the statute and its legislative history obviously disclosed that Congress did not intend the term "national origin" to include citizenship requirements. The Court found persuasive the fact that the Civil Service Commission and Congress also had embraced a practice of requiring citizenship of federal employees. No such history or Congressional action exists in the instant case, however. Just as Congress must have been aware of the Civil Service Commission's practice in *Espinoza,* so, too, must it have been aware of the Civil Service Commission's requirement that all agencies provide the same right to use accrued sick leave for pregnancy-related absences as is provided for absences from any other disability.[10] In addition, as early as 1946, Congress enacted a temporary disability program which provided benefits for pregnancy-related disabilities.[11]

Although the legislative history dealing with the amendment adding the word "sex" to Title VII is meager, it reveals no "obvious Congressional intent" not to reach the employment practice in question. By the time of the 1972 amendments to Title VII, Congress presumably was aware that as long ago as June, 1969,

10. 5 C.F.R. §630.401(b).

11. Railroad Unemployment Insurance Act, 45 U.S.C. §351(k)(2).

the EEOC had adopted the views which were ultimately enunciated in the interpretations relied upon to challenge Petitioner's employment practices.[12]

It is apparent that the Commission's attitude toward pregnancy-related issues has undergone the same evolutionary process as have Congress', society's and the courts' views of the kinds of conduct which constitute employment discrimination. *See, e.g., Rogers v. EEOC,* 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972). The Senate Report accompanying the 1972 Amendments to Title VII emphasizes Congress' concern with the problem of sex discrimination:

> While some have looked at the entire issue of women's rights as a frivolous divertissement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct. As a further point, recent studies have shown that there is a close correlation between discrimination based on sex and racial discrimination, and that both possess similar characteristics. Both categories involve large, natural classes, membership in which is beyond the individual's control; both involve highly visible characteristics on which it has been easy to draw gross,

12. EEOC Decision, Case No. LA 68-4-538E (June 16, 1969); EEOC Decision No. 71-562 (December 4, 1970); EEOC Decision No. 71-1474 (March 19, 1971). If, as Petitioner and its supporting *amici* suggest, it can be said that Congress was aware of and acquiesced in any position of the Commission at the time of the 1972 amendments, that position is reflected in these published decisions.

stereotypical distinctions. The arguments justifying different treatment of the sexes were also historically used to justify different treatment of the races.

While it is true that the extreme aspects of sex-discrimination as it existed in the early part of the twentieth century have been dispelled, and women have now been granted the right to vote and may serve on juries, their status in employment is still subject to blatant discrimination. In a series of decisions in recent years, the courts have voided employment practices and policies which discriminate on the basis of sex, and have, accordingly, set the necessary legal precedents for dealing with this form of discrimination. However, despite the effort by the courts and EEOC, discrimination against women continues to be widespread; and is regarded by many as either morally or physiologically justifiable. S.Rep. No. 92-415, 92d Cong., 1st Sess. 7-8 (1971) (Footnotes omitted.)

Furthermore, the recently adopted regulations of the Department of Health, Education, and Welfare implementing the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.,* relating to the prohibition of sex discrimination in federally assisted education programs, were transmitted to Congress pursuant to Section 431(d)(1) of the General Education Provisions Act, as amended by Section 509(a)(2) of the Education Amendments of 1974, 20 U.S.C. §1232(d)(1). It is of compelling significance that those regulations were not altered by Congress. They became effective on July 21, 1975, and, therefore, reflect current Congressional approval. They provide, in relevant part, as follows:

> (c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, *payment of disability income,* accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment. 45 C.F.R. §86.57, 40 Fed.Reg. 24144 (June 4, 1975) (Emphasis supplied.)

The Office of Federal Contract Compliance and the United States Department of the Treasury also have proposed guidelines and interpretations which require pregnancy-related disabilities to be treated as any other temporary disability for all job related purposes. *See,* respectively, 38 Fed.Reg. 35336 (December 17, 1973), and 40 Fed.Reg. 29074 (July 24, 1975). Just as interpretations of state statutes do not control the construction of federal law although they may be indicative of a general understanding of definitional terms, *Espinoza, supra,* 414 U.S. 86, 88 n.2, so, too, do these administrative views indicate a general understanding that the practice challenged in this litigation constitutes sex discrimination.[13]

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13. Similarly, numerous state court decisions have interpreted state fair employment practice laws' bans against sex discrimination to prohibit practices of the type challenged herein: *Board of Education v. State Division of Human Rights,* 42 App.Div.2d 854, 346 N.Y.S.2d 843 (1973), *aff'd,* 35 N.Y.2d 675, 360 N.Y.S.2d 887 (1974); *Board of Education v. New York State Division of Human Rights,* 42 App.Div.2d 49, 345 N.Y.S.2d 93 (1973), *aff'd,* 35 N.Y.2d 673, 360 N.Y.S.2d

Petitioner's reliance upon the legislative history of the Equal Rights Amendment to the Constitution of the United States is misplaced. The ERA legislative history which indicates that it would not be violative of the Amendment for a *state* to enact *legislation* which provides for special treatment of pregnancy refers only to a situation in which a state would confer upon one sex a benefit which could not be conferred upon members of the other and in which neither sex would suffer any detriment. It does not refer to a situation where the disparate treatment works to the detriment of one sex.[14]

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887 (1974); *Board of Education v. New York State Division of Human Rights,* 42 App.Div.2d 600, 345 N.Y.S.2d 101 (1973), *aff'd,* 35 N.Y.2d 677, 360 N.Y.S. 2d 888 (1974); *Cedar Rapids Community School District v. Parr,* —— Iowa ——, 227 N.W.2d 486 (1975); *Cerra v. East Stroudsburg Area School District,* 450 Pa. 207, 299 A.2d 277 (1973); *Union Free School District No. 6 v. New York State Human Rights Appeal Board,* 35 N.Y.2d 37, 362 N.Y.S.2d 139 (1974). *Contra, Ray-O-Vac v. Wisconsin Department of Industry, Labor & Human Relations,* 8 EPD ¶9656 (Wis. Cir. Ct. 1974), *appeal pending in* Wis. Sup. Ct.

14. As one commentator has noted:

> . . . the matter of *unfavorable* treatment of a socially beneficial function like childbearing was not before Congress. The reports and debates on the amendment repeatedly stress that Congress' concern was with retaining laws which by their nature applied to one sex only but which also reflected sound social policies, not sexual stereotypes. Because its attention was focused on preserving beneficial legislation, there is no evidence that Congress really considered the negative implications of excluding single-sex characteristics from its equal rights formulation. . . . Since the E.R.A. was clearly remedial, it is unlikely that Congress would intentionally approve a rationale that could then be utilized to achieve exactly what the E.R.A. was

C. EXISTING DECISIONAL LAW DEMONSTRATES THAT RESPONDENTS HAVE ESTABLISHED A *Prima Facie* VIOLATION OF TITLE VII.

Petitioner relies upon its analysis of footnote 20 to the majority opinion in *Geduldig v. Aiello,* 417 U.S. 484 (1974), for its principal attack on the decision below. Conspicuously absent from that analysis is any recognition of the narrow holding in that case, the post-*Aiello* decisions of five other United States Courts of Appeals or of the different factual and procedural contexts and benefit plans in *Aiello.*

Aiello dealt only with a constitutional attack under the Equal Protection Clause on a *legislatively* created social welfare program for private employees in which a differentiation was made between pregnancy-related and other disabilities. The majority of the Court applied a certain standard in testing legislation under the Equal Protection Clause and held, in essence, that the classification was "rationally supportable." *Aiello, supra,* 417 U.S. 484, 495. Nothing more was required to sustain the legislation against the Equal Protection assault. Footnote 20, which has been recognized uniformly as a response to the dissenting Justices who would have applied a stricter standard of scrutiny, neither stated nor suggested that a disability program which excludes pregnancy-related disabilities *cannot* constitute sex discrimination. The footnote reflects a finding of fact, based on the record before the Court, that the California

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designed to end: distinctions harmful to a protected class. *Comment, Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination,* 75 Columbia L.R. 441, 473-4 (1975) (Footnote omitted.)

program did not exclude anyone from eligibility because of gender, but rather that it removed one physical condition from the list of compensable disabilities. Indeed, the majority recognized that distinctions involving pregnancy can constitute pretextual efforts to effect invidious discrimination in violation of the Fourteenth Amendment. The Court found a lack of identity between the excluded disability and "gender as such under this insurance program." *Aiello, supra,* 417 U.S. 484, 497 n. 20.

That finding, as limited to the record before the Court, is consistent with Respondents' Title VII analysis of the shifting burdens of proof in this case. Assuming, *arguendo,* similar Title VII and Fourteenth Amendment substantive standards, the plaintiff in *Aiello* carried her initial burden by demonstrating that the state's plan had an adverse impact on women. Then, the defendants, consistent with *Albemarle Paper Co. v. Moody,* 43 U.S.L.W. 4880 (U.S. June 25, 1975) and *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), articulated a legitimate, non-discriminatory reason for the exclusion of certain benefits from the plan. Thereafter, when the burden shifted back to the plaintiff to introduce evidence of a pretext, the plaintiff failed to meet her burden and the court found a lack of identity between the excluded disability and gender *under that insurance program.* In contrast, when the plaintiffs in this case demonstrated the impact of Petitioner's pregnancy-related practices upon female employees, Petitioner did nothing.

As indicated above, five other United States Courts of Appeals have considered pregnancy-related employment practices in Title VII contexts subsequent to *Aiello*.[15] Each of the four decisions which dealt with *Aiello* directly concurred with the Third Circuit's conclusion that Title VII cases involve statutory interpretation rather than constitutional analysis. Each deferred to the EEOC's Guidelines. Each rejected Petitioner's view that footnote 20 requires Title VII plaintiffs to carry a heavy initial burden of proving that distinctions involving pregnancy are mere pretexts. Each court,

15. *Satty v. Nashville Gas Co.*, —— F.2d ——, 11 FEP Cases 1 (6th Cir. 1975); *Hutchison v. Lake Oswego School District*, —— F.2d ——, 11 FEP Cases 161 (9th Cir. 1975); *Gilbert v. General Electric Co.*, —— F.2d ——, 10 FEP Cases 1201 (4th Cir. 1975); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975); *Communications Workers v. American Telephone & Telegraph Co.*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. docketed at* No. 74-1601 (June 19, 1975). *Accord, Women In City Government United v. City of New York*, —— F.2d —— (2d Cir., April 14, 1975) *(per curiam), petitions for cert. docketed at* Nos. 75-70, 71 (July 12, 1975). Only *Holthaus* did not discuss *Aiello* directly. It did, however, rely upon the instant decision and analyze the shifting burdens of proof in the same manner as Respondents do herein. Clearly, it rejected the Petitioner's present assertion concerning the effect of *Aiello*. *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) *(en banc)*, relied upon by Petitioner, also supports the Third Circuit's view in concluding that Title VII's ban against sex discrimination extends to fundamental rights such as the right to marry or bear children.

Similar conclusions were reached by district courts in the following post-*Aiello* cases: *Liss v. School District*, 10 EPD ¶10,312 (E.D. Mo. 1975), *appeals docketed at* Nos. 75-1440, 1447 (8th Cir.); *Sale v. Waverly-Shell Rock Board of Education*, 390 F.Supp. 784 (N.D. Iowa

relying on the record before it, struck the challenged practice. Each rejected, at least impliedly, the argument which presupposes that the lawful scope of employment policies under Title VII is coextensive with the Fourteenth Amendment. As the court stated in *Satty, supra*, "the better approach permits Title VII under the commerce clause to extend beyond the reach of the Equal Protection clause." 11 FEP Cases 1, 4. That conclusion is consistent with this Court's earlier ruling that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-9 (1974).

1975), *leave to appeal denied*, Misc. No. 75-8088 (8th Cir., January 31, 1975); *Zichy v. City of Philadelphia*, 392 F.Supp. 338 (E.D. Pa. 1975).

Decisions were nearly unanimous before *Aiello* also. *See, e.g., Dessenberg v. American Metal Forming Co.*, 8 EPD ¶9575 (N.D. Ohio 1973); *Doe v. Osteopathic Hospital*, 333 F.Supp. 1357 (D.Kan. 1971); *Farkas v. South Western City School District*, 8 EPD ¶9619 (S.D. Ohio 1974), *aff'd without opinion*, 506 F.2d 1400 (6th Cir. 1974); *Lillo v. Plymouth Local Board of Education*, 8 EPD ¶9510 (N.D. Ohio 1973); *Singer v. Mahoning County Board of Mental Retardation*, 379 F.Supp. 986 (N.D. Ohio 1974), *aff'd on other grounds*, —— F.2d ——, 10 EPD ¶10,287 (6th Cir. 1975); *Vick v. Texas Employment Commission*, 6 EPD ¶8933 (S.D.Tex. 1973), *aff'd in part, rev'd in part on other grounds*, 514 F.2d 734 (5th Cir. 1975). Even *Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973), relied upon by Petitioner, is consistent with the instant decision. The court held that arbitrarily fixing a time when a pregnant woman must terminate her employment constitutes proscribed sex discrimination under Title VII. A contrary result was reached with respect to sick benefits because of the court's conclusion concerning the definition of the word "sick" within the meaning of the particular employer's benefit plan.

The Court of Appeals for the Second Circuit cogently demonstrated the fallacy of placing too much reliance upon footnote 20. The court reasoned as follows:

> Footnote 20 . . . is in essence a refutation of the dissenting view as to the Equal Protection standards of judicial scrutiny applicable to the California legislative classification before the Court. It rejects the dissenting view that the California classification should be treated like the legislative classifications in *Reed, supra,* and *Frontiero, supra.* Stating that not '*every legislative classification* concerning pregnancy is a sex-based classification . . . ,' it goes on to say that '[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, *lawmakers are constitutionally free* to include or exclude pregnancy *from the coverage of legislation such as this* on any reasonable basis . . .' . . . . Thus, footnote 20 deals with the constitutional validity of legislative classifications under the Equal Protection Clause, the standards of judicial scrutiny to be applied in making such a determination, and nothing more. Moreover, it does so in the context of the extensive record before the Court as to the operation and effects of the particular statutory insurance program it was considering and the considerations which led the California legislature to adopt it.

Nowhere, either in the body of the majority opinion in *Aiello* or in the footnote, is there any reference to the provisions of Title VII or the EEOC guidelines designed to prohibit the disparate treatment of pregnancy disabilities in the employment context. *Communications Workers, supra,* 513 F.2d 1024, 1029-30.

The court also pointed to Mr. Justice Stewart's earlier note in the majority opinion in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), where he recognized that Title VII was inapplicable to the Fourteenth Amendment cases then before the Court. Mr. Justice Stewart then observed:

> Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women *presumptively* violates Title VII. 29 C.F.R. §1604.10, 37 Fed. Reg. 6837. While the statutory amendments and the administrative regulations are of course inapplicable to the cases now before us, they will affect like suits in the future. 414 U.S. 632, 639 n. 8. (Emphasis added.)

As the court aptly concluded in *Communications Workers, supra,* "It can scarcely be thought that Mr. Justice Stewart in *Aiello sub silentio* invalidated the guidelines which he had said only five months before in *LaFleur* would, in the future, affect suits involving pregnancy-related employment practices." 513 F.2d 1024, 1031 n. 11.

Furthermore, *Aiello* is factually and procedurally distinguishable from the instant case. In *Aiello,* only one aspect of California's social welfare scheme was under attack. Here, numerous aspects of Petitioner's employment practices, both pregnancy-related and otherwise, have been found to be violative of Title VII. That finding alone would support an inference of an intent to dis-

criminate in other areas. *Keyes v. School District No. 1,* 413 U.S. 189, 207-8 (1973).

As the Court of Appeals for the Second Circuit recognized, *Aiello* was decided upon an extensive record in a case in which defenses were raised, briefed and argued in a timely fashion. It did not involve the state of California in its capacity as an employer and was not an employment discrimination case. It involved only the state's social welfare program. Only so-called "normal" pregnancy was excluded from the scope of the plan by the time of this Court's decision. Unlike the plan now before the Court, disabling complications were covered. Petitioner concedes that a disability income plan is "open to attack insofar as it may exclude abnormal complications encountered during pregnancy."[16] It now asserts for the first time, however, that its exclusion of "any cause related to pregnancy" has never been defined, was never raised by Respondents and does not exclude complications in any event.[17] That contention contradicts the entire record. First, the limitation which excludes "disability due to pregnancy or any cause related to pregnancy" is unambiguous. Second, Petitioner's Manager of Personnel Services, who is responsible for the administration of the Income Protection Plan, testified that the plan does not cover disability "related to" pregnancy (A. 42-43). When he made numerous sworn corrections to his deposition testimony on November 27, 1972, he did not alter the testimony concerning the exclusion of pregnancy-related disabilities. Finally, the statement that the court of appeals "misconstrued the plan's coverage by assuming that the plan 'would

16. Brief for Petitioner, p. 16 n. 26.

17. *Id.*

not cover a disability suffered by a pregnant woman but would have covered the disability had the woman not been pregnant' "[18] is erroneous and unfair to that court. At the argument before the court of appeals on October 30, 1974, Mr. Grove, Petitioner's counsel, unequivocally represented that pregnancy and childbirth-related complications such as "blood poisoning," "hypertension," "phlebitis" and "post-partum melancholy" would *not* be covered.[19]

Petitioner has failed to tender any justification for excluding pregnancy-related complications and has never suggested that such complications are actuarily dissimilar to other covered risks. Consequently, the exclusion of such complications must be deemed violative of Title VII in the context of this case. Similarly, Petitioner's practice of denying supplementary salary benefits to females disabled by pregnancy and childbirth has never been justified actuarily or otherwise, discriminates on the basis of sex, and must also be condemned under Title VII.

18. *Id.*

19. Such disabilities were covered in *Aiello, supra,* 417 U.S. 484, 490 n. 15. Because of the surprising contention now set forth in the Brief for Petitioner, Respondents listened to the court of appeals' recording of the oral argument. Although no transcript was prepared, it can be noted that the colloquy between the court and Mr. Grove concerning this issue begins at foot 1276 on side two of tape number 175.

II. To The Extent That Defenses May Exist To Claims Similar To Those Asserted Herein, None Were Raised By Or Available To The Petitioner.

Although the record below was voluminous, the courts below did not have to resolve factual disputes or draw any factual inferences. With respect to the pregnancy-related issues, Petitioner asserted no affirmative defenses and produced no counter-affidavits or statistical information. It simply asserted the lawfulness of its policies and stipulated that the issues were ripe for summary judgment. Notwithstanding Petitioner's unique ability to gather and provide available statistical, cost and actuarial data by virtue of its activities as a national insurance underwriter, it declined the trial court's request for such information, and, instead, consistently maintained that there was no reliable basis upon which to estimate the cost of providing pregnancy-related disability benefits (A. 194). Not until after the entry of judgment did Petitioner and its supporting *amici* rally to present the statistics which the Company previously asserted could neither be provided nor relied upon.[20] A ruling on a motion for summary judgment and the review of a decision on such a motion are to be made upon the record the parties have actually presented to the trial court and not on one potentially possible. *Shafer v. Reo Motors, Inc.*, 205 F.2d 685, 688 (3rd Cir. 1953). *See* also, *Hutchison v. Lake Oswego School District*, —— F.2d ——, 11 FEP Cases 161, 164 (9th Cir. 1975). Just as it was unnecessary in the context of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to decide whether test-

20. Although the *amicus* Chamber of Commerce of the United States of America urged the trial court to consider a cost argument, Petitioner neither relied upon nor adopted that position.

ing requirements which take into account capability for succeeding positions might be utilized upon a proper showing by the employer, it is unnecessary to decide whether the Petitioner's recently proffered arguments constitute valid defenses. *Griggs, supra,* 401 U.S. 424, 432. Nevertheless, Respondents will discuss the Petitioner's contentions briefly.

The *bona fide* occupational qualification standard set forth in 42 U.S.C. §2000e-2(e) is applicable only to hiring and firing charges and, of course, was never asserted herein. In presenting various statistical information, the forces of industry presumably are relying upon the judicially defined defense of "business necessity" in a cost context. The defense applies to facially neutral employment practices which have disparate effects. *Griggs, supra; Moody v. Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973), *vacated,* 43 U.S.L.W. 4880 (U.S. June 25, 1975); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied,* 406 U. S. 906 (1972); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973). Additionally, the burden is on the employer to plead and prove business necessity. *Griggs, supra.*

An alleged increased cost of doing business can no more be a defense to a Title VII charge of sex discrimination in employment than to a Title II charge of race discrimination in public accommodations. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 260 (1964). As one district court pointed out after the presentation of voluminous evidence of cost in a Title VII pregnancy practice case:

> Primary, of course, is the principle that business necessity constitutes a valid defense only to a

situation where the alleged discrimination arises from a policy neutral on its face, and in its intent. The instant case does not fall in this category. Additionally, it is doubtful in the first instance if cost alone would constitute a proper defense. See Robinson v. Lorillard Corporation, 444 F.2d 791, 799 f.n.8 (4th Cir. 1971). The business necessity rationale is premised on a policy of justification by virtue of a showing that the suspect conduct is necessary to the safe and efficient operation of the business. Jones v. Lee Way Motor Freight, 431 F.2d 245 (10th Cir. 1970). As one court has expressed it, 'Necessity connotes an irresistible demand.' United States v. Bethlehem Steel Corp., 446 F.2d 562 (2d Cir. 1971). No such situation exists here.

* * *

In the instant case, the Company chose to negotiate a contract which they knew would result in certain benefits to their employees and deliberately chose to preclude benefits to employees who became pregnant. They cannot now justify such discrimination by simply contending that the cost would be high. In addition, it is obvious that the cost, if prohibitive or destructive of defendant's business, may be reduced in any number of alternative ways, as suggested in the briefs. Simply stated, there is no evidence before the Court to render viable a defense of business necessity. *Gilbert v. General Electric Co.*, 375 F.Supp. 367, 382 (E.D. Va. 1974), *aff'd*, —— F.2d ——, 10 FEP Cases 1201 (4th Cir. 1975).

Furthermore, Petitioner's unsupported contentions concerning costs must be viewed in light of its failure

to present any evidence concerning the cost of its plan[21] and its failure to provide *any* coverage for pregnancy-related disabilities whatsoever. Liberty Mutual suggests that because of allegedly prohibitive costs, industry consistently excludes pregnancy-related disabilities from plans for income maintenance during temporary disabilities. That suggestion is inaccurate. In fact, for more than 25 years, more than half of the major corporations with temporary disability plans have included benefits

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21. The specific data proffered by the Petitioner and its *amici* is irrelevant and valueless. It is not part of the record below, and none of it even relates to this case. Acceptance of that data would result in this Court's applying another employer's *factual* defenses to an employer who never raised them. It would also enable the *amici* to have the factual issues in their own pending litigation resolved by this tribunal. Even if one were to conclude that the *amici's* statistics might have some remote connection to this litigation, they would not justify a reversal of the district court's decision. Assuming, *arguendo*, that AT&T's estimate that inclusion of whatever it means by "normal pregnancy" would have increased costs within its system-wide disability program by $19,036,300.00 for 1971-1972 is not corrupted by its arbitrary use of an eight week benefit period or otherwise, it must be recognized that the increased cost would have covered a work force of approximately 955,752 eligible employees, a fact which is glaringly absent from that employer's *"amicus"* brief to this Court. *See,* Brief of American Telephone & Telegraph Company as Amicus Curiae, p. 2 n.1, *Wetzel v. Liberty Mutual Insurance Co.*, 511 F.2d 199 (3rd Cir. 1975). Applying the resulting annual *per capita* cost of less than $20.00 to the Petitioner's Income Protection Plan and recognizing that approximately one-third of the cost is born by the employees, the resulting cost to the Company in this case would be approximately $.25 per week per employee. Whatever the effect of AT&T's experience may be, it must be left for another tribunal to determine upon another record.

for six or eight weeks for disabilities arising from childbirth or a complication of pregnancy. About 95% of the cases involve disability which does not exceed six weeks. A 1972 Prentice Hall survey showed that of the companies which responded to the survey and provided sick pay, 54% covered employees disabled as a result of pregnancy.[22] Thus, the meat packing companies, Armour and Swift, and related food industries, e.g., Campbell Soup, pay for a maximum of 8 weeks for disability due to pregnancy. The entire auto industry, steel and related can industry and part of the electrical industry pay up to 6 weeks.

The minimal data which Petitioner proffered to the court of appeals in its post-judgment Motion for Leave to Present Background Statistics (A. 188-91) is unenlightening. Included within the figures supplied for the 31-33 month period ending July 31, 1973, is a period of approximately one year during which the Company fired women simply for being pregnant. Nowhere does the Company explain the effect of these involuntary terminations upon its "average" monthly figures. Nor does it

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22. Prentice Hall, Personnel Management, Policies and Practices, Report Bulletin 25, ¶230, p. 459 (June 6, 1972).

For many years the U.S. Department of Labor, Bureau of Labor Statistics, had issued periodically the *Digest of Health and Insurance Plans*. The 1971 edition (GPO 1972), Vol. II, lists on the pages indicated the following plans as paying temporary disability benefits for disabilities arising out of pregnancy: Aluminum Co. of America, 6 weeks, p. 1; American Can Co., 6 weeks, p. 7; American Seating Co., 6 weeks, p. 9; American Standard, Inc., 6 weeks, p. 11; Amstar Corp., 6 weeks, p. 15; Armour & Co., 8 weeks, p. 17; Armstrong Cork Co., 6 weeks, p. 19; Bethlehem Steel, 6 weeks, p. 21; Borden, Inc., 6 weeks, p. 23; Brewers Board of Trade, 26 weeks,

relate any of the data to its own business needs or to the actual cost of its Income Protection Plan. Instead, it as-

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p. 25; Campbell Soup Co., 8 weeks, p. 31; Caterpillar Tractor Co., 6 weeks, p. 35; Chase Brass & Copper Co., Inc., 6 weeks, p. 41; Cluett, Peabody & Co., Inc., 6 weeks, p. 49; Cone Mills, 6 weeks, p. 53; Construction Ind., Painter's District Council 9, 13 weeks, p. 61; Continental Can Co., 6 weeks, p. 63; Crown Zellerbach, 6 weeks, p. 67; Deere & Co., 6 weeks, p. 69; Distillery Industry, 6 weeks, p. 73; Dow Chemical, 6 weeks, p. 79; Retail Drug Industries & Hospitals, 6 weeks, p. 83; E. I. DuPont de Nemours, 6 weeks, p. 85; Firestone Tire & Rubber Co., 6 weeks, p. 87; FMC Corp., 6 weeks, p. 93; Ford Motor Co., 6 weeks, p. 97; Furniture Industry, 6 weeks, p. 101; General Motors, 6 weeks, p. 111; B. F. Goodrich Co., 6 weeks, p. 117; Greyhound Corp., 6 weeks, p. 122; Hotel Ass'n of N.Y.C., 6 weeks, p. 125; Interco, Inc., The Florsheim Shoe Co., 6 weeks, p. 135; Int'l Harvester Co., 6 weeks, p. 141; Int'l Paper Co., 6 weeks, p. 147; Jewelry Manufacturers Ass'n, 6 weeks, p. 151; Johnson & Johnson, 8 weeks, p. 153; Kennecott Copper, 6 weeks, p. 155; LTV Aerospace Corp., 6 weeks, p. 167; Luggage & Leather Goods Industry, 6 weeks, p. 171; Maritime Ind., 6 weeks, p. 177; Mass. Leather Mfrs. Ass'n, 6 weeks, p. 181; Metalworking & Repair Services, 6 weeks, p. 187; Nabisco, Inc., 6 weeks, p. 201; Nat'l Auto Transporters Ass'n, 6 weeks, p. 203; Nat'l Steel Corp., 6 weeks, p. 205; N.Y. Shipping Ass'n, Inc., 6 weeks, p. 207; North American Rockwell Corp., 6 weeks, p. 211; Northwest Forest Products Ass'n, 6 weeks, p. 215; Owens-Illinois, 6 weeks, p. 217; Pacific Maritime Ass'n, 6 weeks, p. 221; Philip Morris, Inc., 6 weeks, p. 233; Printing Industry-Lithographers, 6 weeks, p. 239; Pullman, Inc., 6 weeks, p. 245; RCA, 8 weeks, p. 251; Retail Trade Industry, 20 weeks, p. 257; Retail, Wholesale & Warehouse Industries, 6 weeks, p. 247; Sperry-Rand, 6 weeks, p. 265; Swift & Co., 8 weeks, p. 277; Trucking Industry, 6 weeks, p. 283; TRW, Inc., 6 weeks, p. 285; Uniroyal, Inc., 6 weeks, p. 291; United Air Lines, Inc., 6 weeks, p. 293; U. S. Steel Corp., 6 weeks, p. 297; Upholstering & Allied Trades Industries, 6 weeks, p. 303; Westvaco Corp., 6 weeks, p. 307; Wyandotte Worsted Co., 6 weeks, p. 311.

serts that women receive a disproportionate share of disability benefits and that it makes equal monetary contributions to the Income Protection Plan for men and women.[23] Nowhere is either assertion supported in the record. What is reflected, however, is that if indeed women contribute less to the Income Protection Plan than do men, it is because contributions are based on salary and women in the class have been paid approximately $2,500.00 a year less than their male counterparts (A. 137).

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23. Brief for Petitioner, pp. 8, 15, 22.

CONCLUSION

This case was decided on Respondents' motion for summary judgment. Their employer presented no defenses and there was no disputed question of fact. All questions below, and all questions herein, are questions of law. Virtually every court which has considered these questions has answered them in the same manner as did the distinguished trial judge and the court of appeals. Any other answers would mark a serious retreat from the enlightened procedural and substantive decisions of this Court in the areas of Title VII and other civil rights litigation.

In light of all of the foregoing, Respondents respectfully pray that the judgment of the court of appeals be affirmed in all respects.

Respectfully submitted,

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